No. 105, ORIGINAL

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF COLORADO,

Defendant,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor.

On Exceptions To The Fifth And Final Report Of The Special Master

KANSAS'S MOTION FOR LEAVE TO FILE AND SUR-REPLY

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KANSAS'S MOTION FOR LEAVE TO FILE SUR-REPLY TO COLORADO'S REPLY

Kansas respectfully requests leave to file the sur-reply that accompanies this motion. In support of its motion, Kansas states as follows:

1. The Court exercises complete discretion over its original jurisdiction docket, including the procedures that apply in original cases.

2. Supreme Court Rule 17, titled "Procedure in an Original Action," contains no provisions regarding the filing of any documents in an original case other than a motion for leave to file an original action, the complaint, and a brief in support of such a motion. *See* Sup. Ct. R. 17.3.

3. Kansas filed its Exception and Brief regarding the Master's "Fifth and Final Report" on April 10, 2008. Colorado filed its Reply In Opposition on May 12, 2008.

4. On June 9, 2008, the Court ordered that Kansas's exception be set for oral argument. That argument is now scheduled for December 1, 2008.

5. In a case within the Court's appellate jurisdiction, a reply by the party appealing a lower court judgment would be permitted as a matter of course. Sup. Ct. R. 24.4.

6. There is precedent for the Court granting leave to file a sur-reply. *Kansas v. Colorado*, 541 U.S. 1071 (2004); *see also United States v. Alaska*, 517 U.S. 1207 (1996) (allowing sur-replies).

7. Colorado's Reply in Opposition made numerous arguments to which a reply by Kansas is both warranted and could be of assistance to the Court in resolving the issues presented.

8. To be fair to Colorado and to best assist the Court, Kansas is filing this motion far in advance of the oral argument date, and Kansas's sur-reply complies with the Court's format requirements for merits reply briefs in appellate cases.

9. Most importantly, the sur-reply will aid the Court in achieving a proper resolution of the questions at issue here by permitting Kansas an opportunity to respond to arguments first raised by Colorado in its Reply and by ensuring that the Court is aware of important legal authorities such as *Kentucky v. Dennison, Governor of Ohio*, 65 U.S. (24 How.) 66, 98 (1861), and *California v. Arizona*, 440 U.S. 59 (1979), which contravene Colorado's constitutional arguments.

10. Finally, the availability of reply briefs as a matter of course in appellate cases (like the availability of rebuttal at oral argument) demonstrates that our adversary system of justice embraces the principle that permitting the party appealing to have the final word is a matter of fundamental fairness.

For the reasons set forth above, Kansas respectfully requests that the Court grant this motion for leave to file the accompanying sur-reply.

Respectfully submitted,

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SUMMARY OF ARGUMENT

There are two fundamental flaws in the arguments Colorado makes in its Reply In Opposition To Kansas's Exception (hereinafter "Colorado Reply"). **First**, the critical statutory provision, 28 U.S.C. § 1920, does not apply to this Court's original jurisdiction cases. Rather, the most plausible reading of the statute's use of the word "judge", and not "Justice," especially in light of over 200 years of history and practice in original cases, is that Congress has not dictated and did not intend to dictate what costs this Court may tax in original cases. At a minimum, § 1920 is ambiguous in terms of whether it applies to this Court's original cases, and the canon of constitutional avoidance counsels in favor of construing that provision *not* to apply here. Either way, Kansas deserves an equitable award of expert witness fees for this lengthy and substantial litigation in which Kansas prevailed.

Second, Congress lacks the constitutional authority to dictate the procedures that this Court will apply in original jurisdiction cases. Though the Constitution expressly declares that the Court has appellate jurisdiction subject to "such Exceptions, and under such Regulations as the Congress shall make," U.S. Const. art. III, § 2, cl. 2, Article III notably fails to give Congress any power to regulate the Court's original jurisdiction. If Congress can dictate procedures in the Court's original cases, then the Article III distinction between congressional power over original and appellate jurisdiction is rendered meaningless. The Court has never held that

Congress has the power to regulate the Court's procedures in original cases, and more than once has declared the contrary. Indeed, Chief Justice Taney explained the unique self-executing and equitable nature of the Court's original jurisdiction 150 years ago:

> [I]t has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this court has the authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.

Kentucky v. Dennison, Governor of Ohio, 65 U.S. (24 How.) 66, 98 (1861).

ARGUMENT

I. Contrary To Colorado's Arguments, The Language Of 28 U.S.C. § 1920, Referring To "A Judge Or Clerk Of Any Court Of The United States," Does Not Apply To This Court Or, At A Minimum, Is Ambiguous And Should Be Construed To Avoid Raising Important And Difficult Constitutional Issues

1. As a matter of statutory interpretation, the key provisions at issue in this case are 28 U.S.C. § 1920 and 28 U.S.C. § 451. Section 1920, titled "Taxation of Costs," states that "A judge or clerk of any court of the United States may tax as costs the following: * * * (3) Fees and disbursements for printing and witnesses." It is by virtue of § 1920(3) that Colorado

argues that 28 U.S.C. § 1821(b) limits the award of expert witness fees to $40 per day. *See* Colorado Reply at 4.

There is no reason, however, to look to § 1821(b) if 28 U.S.C. § 1920 does not apply to original cases in this Court. Section 1920 is the gateway to statutes such as § 1821(b), so there is no reason to consider § 1821 unless and until the Court concludes that § 1920 applies. The essential statutory interpretation issue is whether the definitional language of § 1920, "A judge or clerk of any court of the United States," includes this Court.

2. Colorado relies on the modifying phrase "court of the United States" in arguing that § 1920 must apply to this Court because 28 U.S.C. § 451 defines "court of the United States" to "include[] the Supreme Court of the United States . . . ." Colorado Reply 6–12. Colorado's simplistic analysis, however, fails to give any effect to the very first noun in § 1920, the word "judge."

Importantly, the phrase "judge of the United States" is also defined in 28 U.S.C. § 451. The statutory definition of that phrase makes clear that "judge" "includes judges of the courts of appeals, district courts, Court of International Trade and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior." *But it does not include Justices of this Court.* Instead, § 451 makes clear that the U.S. Code uses different language when Congress means this Court, declaring that the "term 'justice of the United States' includes

the Chief Justice of the United States and the associate justices of the Supreme Court."

The Court should not accept Colorado's invitation to construe § 1920 in a way that reads the important word "judge" right out of the statute. "It is the duty of the court to give effect, if possible, to every clause and word of a statute avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Begay v. United States*, 553 U.S. ___, 128 S. Ct. 1581, 1585 (2008) (applying the canon); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (same). This "cardinal principle of statutory construction," *Williams v. Taylor*, 529 U.S. 362, 404 (2000), cuts strongly against Colorado here.

Indeed, Colorado's claim that it would have been awkward for Congress to phrase § 1920 in any other way while intending the statute to apply to this Court rings hollow. *See* Colorado Reply at 14. It would have been a simple matter for Congress to draft § 1920 to declare, in complete accordance with the definitions of § 451, that "A Justice, judge, or clerk of any court of the United States may tax as costs the following . . . ." *if that is what Congress actually intended to do.*

The better reading of § 1920 is that it does not apply to this Court. Indeed, all authorities and evidence suggest that Congress has never attempted to regulate the Court's procedures in original cases, nor has it ever intended to do so. As a leading treatise on the federal courts puts it, "Congress has

not made any effort to control the Court's procedure" in original cases. 17 Charles Alan Wright et al., *Federal Practice & Procedure* § 4054, at 235 (3d ed. 2007).

3. Nor does § 1920's use of the word "clerk" assist Colorado here, for at least two reasons. *See* Colorado Reply at 13–14. First, there are important indications that Congress viewed this Court and its Clerk as exempt from procedural rules that are generally applicable to the lower federal courts. Thus, 28 U.S.C. § 1911 explicitly recognizes that the Supreme Court "may fix the fees to be charged by its clerk." Second, the most plausible reading of § 1920 is that the two nouns in the definitional clause—"judge" and "clerk"—go together and are jointly modified by the phrase "of any court of the United States." So when "judge" refers to lower federal court judges, not Justices of this Court, the noun "clerk" likewise should be read to refer to "clerk" of the courts which have "judges", not *the Clerk* of this Court which has *only Justices*.

4. At a minimum, § 1920's simultaneous use of the word "judge" and the phrase "court of the United States" makes the statute ambiguous with respect to the question whether it applies to this Court. Because § 1920 is ambiguous, the canon of constitutional avoidance counsels in favor of interpreting the statute *not* to apply to this Court.

"It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is

our plain duty to adopt that construction which will save the statute from constitutional infirmity." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). The constitutional avoidance canon "seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections." *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998). The Court has relied upon this important canon of construction for over 100 years, *see, e.g., Grenada County Supervisors v. Brown*, 112 U.S. 261, 268–69 (1884) (Harlan, J.); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Holmes, J.), and it remains vital. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 385 (2005) (discussing the canon and emphasizing that it is "a means of choosing between" possible interpretations).

As explained above, § 1920 is susceptible of more than one construction because of its use of the word "judge" (not "judge or Justice"), as modified by the descriptive phrase "of any court of the United States." As explained below, there is a substantial question whether Congress has the constitutional authority to dictate procedures, such as the taxing of costs, in the Court's original jurisdiction cases. The canon of constitutional avoidance provides a well-recognized and appropriate basis for the Court to choose between the possible interpretations of § 1920.

II. Contrary To Colorado's Arguments, Congress Lacks The Constitutional Power To Dictate Procedures In This Court's Original Jurisdiction Cases

1. Congress lacks the constitutional authority to mandate the procedures that this Court will apply in original jurisdiction cases. Though the Constitution expressly declares that the Court has appellate jurisdiction subject to "such Exceptions, and under such Regulations as the Congress shall make," U.S. Const. art. III, § 2, cl. 2, Article III notably fails to give Congress any such power with respect to original jurisdiction cases.

If Congress can mandate procedures in the Court's original cases, then the textual distinction in Article III between congressional power over original and appellate jurisdiction is rendered meaningless. That point is emphasized in one of the leading treatises on the federal courts:

> It is clear from the language of [Article III] that Congress can regulate the Court's appellate jurisdiction; it is not clear whether Congress can exercise similar control over its original jurisdiction. Of course, the fact the drafters of Article III included a provision that gives Congress the authority to regulate the Court's appellate jurisdiction, coupled with their failure to include a comparable provision directed at its original jurisdiction, strongly suggests Congress cannot regulate or modify the latter.

22 James Wm. Moore et al., *Moore's Federal Practice*, § 402.02[2][b], at 402-24.3 (3d ed. 2008) (current

chapter on original jurisdiction by Drew S. Days, III); *see also* David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government*, 1789-1791, 2 U. Chi. L. Sch. Roundtable 161, 216 (1995) ("The explicit provision authorizing Congress to make exceptions to the *appellate* jurisdiction, moreover, casts considerable doubt on the alternative hypothesis that Congress may make exceptions from the original jurisdiction as well.")

2. Colorado argues that two early decisions of the Court suggest that Congress may enact procedures to be used in this Court's original jurisdiction cases. *See, e.g.*, Colorado Reply at 16–17 (citing *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320 (1796), and *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1855)). But neither of those cases involved a dispute over the question whether Congress has the constitutional power to dictate procedures in original cases, nor had Congress actually enacted such legislation. The sentence fragments on which Colorado relies are classic dicta. Indeed, in each case Colorado relies on a single off-hand reference by the Court to an issue not before the Court and such reference is made without either citation to supporting legal authority or any actual discussion. More importantly, the dicta in *Grayson* and *Florida v. Georgia* is directly contradicted both by later decisions of the Court and by the actual longstanding practices of the Court in original cases.

At least three subsequent decisions of the Court reject the suggestion that Congress has plenary authority to regulate this Court's original

jurisdiction. Perhaps most importantly, only six years after the dicta in *Florida v. Georgia*, Chief Justice Taney made clear that the Court's original jurisdiction is self-executing, needing no Act of Congress in order for it to be exercised or implemented, and that the Court itself creates the procedures in original cases:

> [i]t has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the Constitution, this court has authority to exercise it without any further act of Congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.

Kentucky v. Dennison, Governor of Ohio, 65 U.S. (24 How.) 66, 98 (1861).

More recent original jurisdiction cases also confirm that the Court alone controls the procedures in such cases. In *California v. Arizona*, 440 U.S. 59 (1979), for example, the Court declared that "[t]he original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation." *Id.* at 65. Addressing the question whether Congress might withdraw certain suits from the Court's original jurisdiction, the Court made clear that Article III distinguishes between Congress's power over the inferior federal courts and this Court's original jurisdiction:

> Congress has broad powers over the jurisdiction of the federal courts and over the sovereign immunity of the United States, but it is extremely doubtful that they include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution.

Id. at 66.

Perhaps most telling is the Court's decision in *Texas v. New Mexico*, 482 U.S. 124 (1987), which Colorado misreads. Colorado Reply at 19. In *Texas v. New Mexico* the parties disputed whether New Mexico would have to pay postjudgment interest in the event the Special Master recommended that damages be awarded against New Mexico. New Mexico argued that there was no statute authorizing such interest, and therefore the Court had no power to award it. Contrary to Colorado's suggestion, Colorado Reply at 19, the issue was not whether the common law barred postjudgment interest, and even if that were the issue, it would make no difference to the analysis. In language that could not be more clear, Justice White explained for the Court that

> New Mexico submits that there is *no statutory authority* for this Court to allow postjudgment interest in any form and that we are therefore without power to do so in this original action. It relies on the statements in *Pierce v. United States*, 255 U.S. 398, 406 (1921), that postjudgment interest may not be awarded absent statutory authority. But *we are not bound by this rule in exercising our original jurisdiction.*

482 U.S. at 132 n.8 (1987) (emphasis added).

3. A leading treatise on the federal courts recognizes that stray statements in *Grayson* and *Florida v. Georgia* conflict with the Court's later and more recent pronouncements on the question whether Congress may dictate the procedures in the Court's original jurisdiction cases. *See* 17 Charles Alan Wright et al., *Federal Practice & Procedure* § 4054, at 235 (3d ed. 2007) (citing many of the cases just discussed). Nonetheless, that treatise makes clear that, "[i]f indeed the Constitution establishes original jurisdiction beyond congressional control, the Court must have final authority over the procedure to be used. *Any other conclusion would subject the constitutional jurisdiction to drastic impairment or even defeat by unworkable procedures.*" *Id.* (emphasis added).

Indeed, if Congress has the power to dictate this Court's procedures in original jurisdiction cases, there is no apparent reason why Congress could not impose a number of requirements that would be quite onerous. For example, Congress might preclude the use of Special Masters altogether, require certain credentials for masters, or provide its own mechanism for selecting masters. Congress might require jury trials, or impose deadlines for cases to be resolved. In short, Congress might adopt any number of "unworkable procedures" if this Court declares that, as Colorado contends, Congress has the constitutional power to dictate procedures in this Court's original cases.

The Wright et al. treatise further notes that "Congress has not made any effort to control the

Court's procedures" in original cases. *Id.* Kansas submits that the reason Congress has not done so is because Congress has never believed it had the power to do so under the Constitution. For the past 150 years, there has been not a single suggestion from either the Court *or Congress* that Congress might have such power. Yet Colorado is arguing that when Congress revamped the judicial code in 1948, Congress asserted precisely such a power by enacting what are now 28 U.S.C. § 1920 and § 451.

4. This Court's original jurisdiction cases involving disputes over fees and costs provide further evidence that the Constitution reserves to the Court alone the power to determine what is fair and appropriate in each original case. Indeed, the awarding of costs and the allocation of Special Master fees have never been treated as matters resolved by any federal statute. Going back at least 100 years, it is clear that the Court has viewed its original jurisdiction as having a strong equitable component, permitting the Court to do what it deems fair and just in each case.

Thus, in *Missouri v. Illinois*, 202 U.S. 598 (1906), for example, the Court addressed a dispute over costs to be awarded in an original case between two States. Writing for the Court, Justice Holmes made clear that the Court has the power to award costs as it deems appropriate in original cases. Specifically, he rejected the notion that costs necessarily should be divided in boundary dispute cases. *Id.* at 599. Similarly, in *Louisiana v. Mississippi*, 466 U.S. 921 (1984), and *Texas v. New Mexico*, 475 U.S. 1004 (1986), several members of the Court dissented from

orders allowing certain expenses sought by Special Masters. In so doing, the dissenting Justices made clear that "[t]he fees and expenses charged by a Special Master when allowed by this Court, represent our assurance to the parties that the charges are reasonable and proper." *Louisiana*, 466 U.S. at 923 (Burger, C.J., dissenting). Such cases highlight both that the Court has the authority to determine what is reasonable and proper in original cases, and that the Court exercises considerable discretion in making such decisions.

If the Court were to accept the proposition that Congress can regulate expert witness fees in original cases, then it appears the Court logically would have to accept an Act of Congress regulating the use, selection, or fees of Special Masters, any time deadlines Congress might impose, or a host of other procedural rules that Congress might enact (indeed, has enacted for the lower federal courts). In other words, under Colorado's view, Congress could eliminate by statute the discretion the Court long has exercised in determining what Special Master fees and expenses are "reasonable and proper," and how the parties should share in paying those fees. The Constitution does not permit such a result.

5. Finally, if Congress can dictate—and as Colorado argues here already has dictated—procedures in the Court's original cases, then presumably the Court's own rule on original jurisdiction may need to be amended and may be superseded in some respects. The Court's own rule, however, to the contrary strongly indicates that the

Court has always recognized the special self-executing and equitable nature of the Court's original jurisdiction. Indeed, for about 150 years, the Court did not even deem it necessary to adopt a formal rule addressing procedures in original jurisdiction cases. The first formal rule was adopted in 1939, as Rule 5. *See Revised Rules of the Supreme Court of the United States*, 306 U.S. 671, 687–88 (1939). Much like the current rule, Rule 5 provided the Court with great discretion in original cases and articulated few specific procedures. In its entirety, the rule read as follows:

> ORIGINAL ACTIONS
>
> Cases on the original docket shall be governed, as far as may be, by the rules applicable to cases on the appellate docket.
>
> The initial pleading in any such action may be accompanied by a brief and shall be prefaced by a motion for leave to file, which motion shall be presented to the court by the clerk on the first motion day following its lodgment in the clerk's office. If leave to file is granted the case will be placed on the original docket and the parties shall make such cash deposit with the clerk for the payment of his fees as he may require.
>
> Additional pleadings shall be filed as the court directs.

Id.

Seventy years later, the current rule, Rule 17, addresses only a few more issues than the original Rule 5. Importantly, Rule 17 directs that "[t]he form

of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence *may be taken as guides*." Sup. Ct. R. 17.2 (emphasis added). Certainly, nothing in the Court's own rules has ever suggested that in original cases the Court is bound to follow rules that are binding on the lower federal courts. Indeed, as one commentator recognized 50 years ago, in original cases the Court has "proceeded on an *ad hoc* basis, fashioning rules as specific questions arose and carefully reserving the right to deviate from those rules as circumstances might require. This carefully preserved flexibility remains today a distinctive feature of the procedure in original actions." Note, *The Original Jurisdiction Of The United States Supreme Court*, 11 Stan. L. Rev. 665, 686 (1959).

Colorado's position in this case, however, necessarily suggests that the Court's Rule 17 is both deficient in its scope and subject to amendment or abolition by an Act of Congress. Kansas respectfully submits that such an assertion of congressional supremacy is inconsistent with the plain text of Article III, with numerous statements in the Court's own decisions, with over 200 years of the Court exercising considerable discretion in original cases, and with over 200 years in which Congress has never asserted explicitly that it was regulating the Court's original jurisdiction procedures. In the face of such authority and evidence, Colorado's claim that 28 U.S.C. § 1920 implicitly dictates procedures in this Court's original cases must fail.

* * * * * * *

At the end of the day, the Court should decide this case in a way that maintains the Court's longstanding authority to determine the procedures in original cases. One option is for the Court to declare that Congress lacks the constitutional authority to regulate procedures in original cases. Such a holding would make clear that a statute such as 28 U.S.C. § 1920 cannot apply to the Court's original jurisdiction.

Alternatively, the Court could adopt a plain language reading of the statutory phrase "a judge or clerk of any court of the United States" and conclude that § 1920 does not include this Court. Another approach leading to the same result would be to recognize ambiguity in the language of § 1920 and rely upon both the Court's longstanding history and practice in original cases and the constitutional concerns identified above to invoke the canon of constitutional avoidance to read § 1920 not to include this Court. Any of these options would achieve the correct result by allowing for the determination of an equitable award of expert witness fees to Kansas.

CONCLUSION

The Special Master incorrectly concluded that he had no discretion to consider awarding Kansas expert witness fees in excess of $40 per day. Thus, the case should be remanded to the Master to determine an equitable award of expert witness fees to Kansas as the prevailing State in this litigation.

Respectfully submitted,

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